Guideline Sentencing Update

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Sentencing Procedure

Plea Bargaining—Dismissed Counts

En banc Fifth Circuit reconsiders, holds that conduct in dismissed counts may be considered in upward departure decision. Defendant pled guilty to two bank robberies; two other bank robberies were dismissed as part of the plea agreement. The district court departed upward after finding that defendant's criminal history was underrepresented, basing its decision in part on the dismissed robberies. In *U.S. v. Ashburn*, 20 F.3d 1336 (5th Cir. 1994) [6 *GSU* #13], the appellate court remanded, holding that "[c]ounts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure."

Upon reconsideration, however, the en banc court held that prior criminal conduct related to counts dismissed as part of a plea bargain may be used to justify an upward departure. The court reasoned that §4A1.3 "expressly authorizes the court to consider 'prior similar adult criminal conduct not resulting in a criminal conviction.' . . . Neither this guideline nor its commentary suggests that an exception exists for prior similar criminal conduct that is the subject of dismissed counts of an indictment. . . . We have found no statute, guidelines section, or decision of this court that would preclude the district court's consideration of dismissed counts of an indictment in departing upward."

U.S. v. Ashburn, 38 F.3d 803, 807–08 (5th Cir 1994) (en banc) (two judges dissenting).

See *Outline* at IX.A.1.

Offense Conduct

Mandatory Minimums

Fourth Circuit holds that mandatory minimum sentences are to be based only on conduct in the offense of conviction. Defendant was convicted on a charge of conspiracy to possess with intent to distribute and to distribute marijuana. The indictment and plea agreement specified that the conspiracy involved over 100 kilograms of marijuana, but the agreement also stated that 85 kilograms was attributable to defendant. Defendant stipulated that another 79 kilograms from a separate marijuana conspiracy in Arizona was includable as relevant conduct under the Guidelines. The total of 164 kilograms resulted in a guideline range of 46–57 months. However, the district court applied 21 U.S.C. §841(b)(1)(B)(vii), which mandates a five-year minimum sentence for 100 kilograms of marijuana, concluding that defendant's admission in the plea agreement that the conspiracy involved over 100 kilograms indicated that defendant necessarily foresaw that amount.

The appellate court remanded, concluding first that the "indictment, plea agreement, and stipulation of facts merely describe . . . the quantity of marijuana for which the conspiracy as a whole was responsible. Aside from the 85 kilograms of marijuana for which Estrada admitted personal responsibility, they do not attribute an amount that was within the scope of his agreement and that was reasonably foreseeable to him." Defendant's statements could not be read as an admission of responsibility for 100 kilograms of marijuana in the offense of conviction.

The government argued in the alternative that the sentence was proper because the 79 kilograms from Arizona that defendant agreed were relevant conduct should also be included in the calculation of the mandatory minimum amount. The appellate court rejected that argument, agreeing with *U.S. v. Darmand*, 3 F.3d 1578, 1581 (2d Cir 1993), that "[t]he mandatory minimum sentence is applied based only on conduct attributable to the offense of conviction. . . . Because the 79 kilograms of marijuana from the Arizona conspiracy are not a part of the offense charged in Count One, it could not be properly considered in determining the applicability of the mandatory minimum sentence under §841(b)." The court remanded for the district court to make a specific factual determination of the amount of marijuana attributable to defendant in the offense of conviction, which it had not done before because it relied on the plea agreement.

U.S. v. Estrada, 42 F.3d 228, 231–33 (4th Cir 1994) (Wilkins, C.J.). *But cf. U.S. v. Reyes*, 40 F.3d 1184, 1151 (10th Cir. 1994) (for defendant convicted on one count of possession of cocaine with intent to distribute, affirming inclusion of cocaine from prior related transactions to reach mandatory minimum despite lower amount specified in indictment—defendant received notice in plea agreement that minimum might apply).

See *Outline* at II.A.3.

Sixth Circuit holds that drug quantities from different offenses may not be aggregated for mandatory minimum purposes. Defendant was convicted of a conspiracy to distribute cocaine base that involved 23 grams. He was also convicted on a separate possession charge that involved 37 grams of cocaine base. The district court concluded that it had "no discretion" and sentenced defendant under 21 U.S.C. §841(b)(1)(A) for a violation of §841(a) involving 50 grams or more of cocaine base.

The appellate court remanded. "It is obvious from the statute's face—from its use of the phrase '*a* violation'—that this section refers to a *single* violation. Thus, where a defendant violates subsection (a) more than once, possessing less than 50 grams of cocaine base on each separate occasion, subsection (b) does not apply, for there is no *single* violation involving '50 grams or more' of cocaine base. This is true even if the sum total of the cocaine base involved all together, over the multiple violations, amounts to more than 50 grams." The court noted that "§841(b)(1)(A) is quite unlike the sentencing guidelines," which require aggregation of amounts in multiple violations. Section 841(b)(1)(A) "requires a court to consider separate violations of §841(a) without aggregating the amount of drugs involved."

U.S. v. Winston, 37 F.3d 235, 240–41 & n.10 (6th Cir. 1994).

See *Outline* at II.A.3.

Fourth Circuit holds that Guidelines method of aggregating different drugs should not be used to compute mandatory minimums. Defendant was convicted of conspiracy to distribute cocaine and cocaine base, and of possession with intent to distribute cocaine base. At sentencing, "the district court attributed to Boone 4.23 kilograms of powder cocaine and 9.24 grams of cocaine base, neither of which, individually, meet the minimum drug amounts of [21 U.S.C. §] 841(b)(1)(A). However, the district court, utilizing the drug conversion tables of U.S.S.G. §2D1.1, comment (n.2), aggregated the 4.23 kilograms of cocaine and 9.24 grams of cocaine base under U.S.S.G. §2D1.1, comment (n.6) and arrived at a total amount of 52 grams of cocaine base. On this basis the district court invoked the mandatory life provision of section 841(b)(1)(A). . . . [W]hile aggregation may be sometimes required under the Guidelines, '§841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics.'" Defendant should have been sentenced under §841(b)(1)(B) for the lower amounts.

U.S. v. Harris, 39 F.3d 1262, 1271–72 (4th Cir 1994).

See *Outline* at II.A.3.

Adjustments

Obstruction of Justice

D.C. Circuit holds that clear and convincing evidence is required for application of §3C1.1 to perjury in trial testimony. Defendant's trial testimony contradicted a police officer's testimony. The trial court found—by a preponderance of the evidence—that defendant had committed perjury and applied the §3C1.1 enhancement for obstruction of justice. Defendant appealed and the appellate court remanded, concluding that a higher standard of proof was required.

Section 3C1.1, comment. (n.1) "direct[s] trial judges to evaluate the testimony 'in a light most favorable to the defendant.' In our view, the enunciated standard exceeds a 'preponderance of the evidence.' . . . [W]e think that it is something akin to 'clear-and-convincing' evidence. . . . We have never seen the preponderance-of-the-evidence standard defined along the lines indicated in Application Note 1 . . . . And we cannot imagine why the Sentencing Commission would have written the Application Note as it did had it intended nothing more than the usual standard of proof. . . . [W]e hold that when a district court judge makes a finding of perjury under section 3C1.1, he or she must make independent findings based on clear and convincing evidence. The nature of the findings necessarily depends on the nature of the case. Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more."

U.S. v. Montague, 40 F.3d 1251, 1253–56 (DC. Cir. 1994). *See also U.S. v. Onumonu*, 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 1 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard").

See *Outline* at III.C.2.a and 5.

Eighth Circuit holds that obstruction at first trial may be used to enhance sentence at second sentencing after first conviction was reversed. Defendant's sentence was increased under §3C1.1 for committing perjury during his trial testimony. However, his conviction was reversed and remanded for retrial. He then pled guilty to a lesser charge. The district court again imposed a §3C1.1 enhancement based upon defendant's perjury during the first trial.

The appellate court affirmed. "A defendant's attempt to obstruct justice does not disappear merely because his conviction has been reversed on grounds having nothing to do with the obstruction.

The trial was part of the prosecution of the offense to which defendant pleaded guilty on remand. Section 1B1.4 of the Sentencing Guidelines allows courts to 'consider, without limitation, any information concerning the . . . conduct of the defendant, unless otherwise prohibited by law,' in determining whether to depart from the guideline range. Defendant does not deny that he lied under oath, nor does he point us to any reason, other than the reversal of his conviction, that would serve to limit the District Court's ability to consider his perjury in enhancing his sentence on remand. We hold that the reversal of a conviction on other grounds does not limit the ability of a sentencing judge to consider a defendant's conduct prior to the reversal in determining a sentence on remand."

U.S. v. Has No Horse, No. 94-2365 (8th Cir. Dec. 14, 1994) (Arnold, C.J.).

See *Outline* generally at III.C.4.

Vulnerable Victims

Ninth Circuit holds that vulnerable victim need not be victim of offense of conviction, also affirms departure for extreme psychological injury to victims. Defendant pled guilty to several counts of obstructing an FBI investigation, making false statements to the FBI, and obstructing justice by giving false testimony to a grand jury. All related to his false claims of knowing the whereabouts of a long-missing child and the identity of her killer. Based on the anguish suffered by the child's family in having their hopes raised and then dashed by defendant's "cruel hoax" (which included statements directed at the family), the district court enhanced his sentence under §3A1.1 even though the family was not the direct victim of the offenses of conviction.

The appellate court affirmed. "We hold that courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a 'vulnerable victim' under section 3A1.1. By the words of the provision itself, no nexus is required between the identity of the victim and the elements of the crime charged. . . . Moreover, the Guidelines specifically instruct the district court to take into account in adjusting the defendant's base offense level 'all harm' the defendant causes. U.S.S.G. §1B1.3(a)(3). We conclude that even though the harm Haggard caused Michaela's family members was not an element of any of the crimes of which he was convicted, the district court did not err in considering them 'vulnerable victims' for purposes of section 3A1.1." *See also U.S. v. Echevarria,* 33 F.3d 175, 180–81 (2d Cir. 1994) (affirmed: patients were vulnerable victims of defendant who posed as doctor to fraudulently obtain medical payments from government and insurers—defendant "directly targeted those seeking medical attention" and "exploit[ed] their impaired condition").

The court also affirmed an upward departure under §5K2.3 for extreme psychological injury to victims. "In these circumstances, Michaela's family was a direct victim of Haggard's criminal conduct." The court rejected defendant's claim that applying §5K2.3 and §3A1.1 was double counting: "The two provisions in question account for different aspects of the defendant's criminal conduct. One section focuses on the psychological harm the defendant caused his victims. . . . The other section accounts for the defendant's choice of victims." The court similarly upheld a departure under §5K2.8, finding that the family was a direct victim of the offense and that defendant's conduct "was in fact unusually cruel and degrading to Michaela's family."

U.S. v. Haggard, 41 F.3d 1320, 1325–27 (9th Cir 1994).

See *Outline* at III.A.1.b, VI.B.1.d and e.

Acceptance of Responsibility

First Circuit holds that obstruction of justice cannot preclude the extra-point reduction under §3E1.1(b) unless it affects timeliness requirement. Defendant received an obstruction enhancement under §3C1.1. The district court determined that this was an "extraordinary case" where both §3C1.1 and §3E1.1(a) applied and granted a two-level reduction for acceptance of responsibility. However, without analyzing whether defendant met the requirements of §3E1.1(b), the court refused to grant the extra-level reduction under that section.

The appellate court remanded, holding that once the district court found that defendant qualified for the two-point reduction under §3E1.1(a), it had to consider whether he qualified for §3E1.1(b). "The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied. . . . [I]f a defendant's obstruction of justice directly precludes a finding of timeliness under section 3E1.1(b), then a denial of the additional one-level decrease would be appropriate. If, however, the defendant's obstruction of justice has no bearing on the section 3E1.1(b) timeliness inquiry, . . . then the obstruction drops from the equation."

U.S. v. Talladino, 38 F.3d 1255, 1263–66 (1st Cir 1994).

See *Outline* at III.E.5.

Eighth Circuit affirms denial of extra-point reduction for guilty plea after first conviction was reversed. Defendants were convicted on four counts after a trial, but their convictions were reversed on appeal. They then pled guilty to one count and argued that the district court should have awarded a point for timely acceptance of responsibility under §3E1.1(b). The appellate court affirmed the denial. "Even though each defendant pleaded guilty within approximately three months of the reversal of his convictions on initial appeal, we do not agree that the government was saved much effort by those pleas, since the bulk of preparation by the government was for the initial trial and could relatively easily have been applied to the second trial as well."

U.S. v. Vue, 38 F.3d 973, 975 (8th Cir 1994).

See *Outline* at III.E.5.

General Application

Sentencing Factors

Tenth Circuit holds that post-sentencing conduct may not be considered at resentencing after remand. Defendant's first sentence was remanded as an improper downward departure. At resentencing the district court again departed, partly on the basis of defendant's successful completion of six-month periods of community confinement and home confinement. Distinguishing between a limited remand and, as here, a complete remand for resentencing ("de novo resentencing"), the appellate court noted "that *de novo* resentencing permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *U.S. v. Ortiz,* 25 F.3d 934, 935 (10th Cir. 1994) (affirmed: district court properly considered new evidence regarding drug quantity in offense of conviction). *Accord U.S. v. Bell,* 5 F.3d 64, 67 (4th Cir. 1993); *U.S. v. Cornelius,* 968 F.2d 703, 705 (8th Cir 1992).

Here, however, the appellate court held that the rule in *Ortiz* does not apply to new conduct that occurred after the first sentencing. "While [*Ortiz*] indicates resentencing is to be conducted as a fresh procedure, the latitude permitted is circumscribed by those factors the court could have considered 'at the first sentencing hearing.' Thus, events arising after that time are not within resentencing reach." Whether or not a defendant's post-sentencing rehabilitative conduct may provide a ground for downward departure, therefore, it was improper to consider it when resentencing this defendant.

U.S. v. Warner, No. 94-4113 (10th Cir. Dec. 19, 1994) (Moore, J.).

See *Outline* generally at I.C and IX.F.

Amended opinion: *U.S. v. Mun,* 41 F.3d 409, 413 (9th Cir. 1994). Amending the opinion originally decided July 18, 1994, and reported in 7 *GSU* #1, the court deleted the language relating to comity. The court still affirmed the sentence, but based its holding on the language of §5G1.3 (1987): Section "5G1.3's provision mandating concurrent sentences applies only if 'the defendant is already serving one or more unexpired sentences.' At the time the federal court sentenced Mun he was not serving another sentence. The state sentence was imposed after the federal sentence. Therefore, §5G1.3 did not require the district court to alter its sentence to make it run concurrently with the state sentence."

See *Outline* at V.A.2 and 3.

Vacated for rehearing en banc: *U.S. v. Stoneking,* 34 F.3d 651 (8th Cir. 1994), order granting rehearing en banc and vacating opinion, Sept. 16, 1994. *Stoneking* was summarized in 7 *GSU* #3 and cited in the summary of *Pardue* in 7 *GSU* #4.

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